

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7618

Petition of EOS Ventures, LLC for a certificate of public)
good, pursuant to 30 V.S.A. § 248, authorizing the)
installation and operation of a 2.2-MW solar electric)
generation facility located at the Southern Vermont Energy)
Park on Route 7 in Pownal, Vermont)

Order entered: 5/5/2011

ORDER RE DECOMMISSIONING PLAN

I. INTRODUCTION

On September 8, 2010, the Public Service Board ("Board") granted a Certificate of Public Good ("CPG"), pursuant to 30 V.S.A. § 248, to EOS Ventures, LLC ("EOS"), authorizing the installation and operation of a 2.2 MW solar electric generation facility in Pownal, Vermont (the "Project").

The CPG included the following language as Condition 8:

Prior to proceeding with construction, EOS shall submit to the Board for review and approval a plan for decommissioning that includes a detailed estimate of the projected decommissioning costs and a plan for the creation of a Fund. EOS shall ensure that the Fund (1) is backed by an "irrevocable standby" Letter of Credit or another appropriate financial security, (2) increases over time to account for inflation, and (3) is bankruptcy-remote, to protect it from creditor claims in the event the proposed project encounters financial difficulties. Parties shall have one week, from the date the plan is filed with the Board, to file any comments.

On March 24, 2011, as required by Condition 8, EOS filed its proposed decommissioning fund ("Fund") for review by the parties and approval by the Board.

On March 31, 2011, the Department filed comments seeking changes to the proposal, but recommending its overall approval.

On April 5, 2011, Board staff issued a memorandum requesting additional information and seeking additional comments from the Department.

On April 12, 2011, EOS filed the requested information and agreed to the Department's suggested modifications.

On April 19, 2011, the Department filed comments as requested by the Board.

III. DISCUSSION AND CONCLUSION

EOS proposes to decommission the Project, at the end of the Project's useful life, as required under the Board's September 8, 2010 Order and CPG.¹ EOS estimates that decommissioning the Project will cost approximately \$112,500 (including removal of the Project's structural elements and site restoration).² EOS proposes, at a minimum, to:

- establish a Fund by one of two means: (1) a stand-alone escrow account (Plan A) or (2) a stand-alone "irrevocable standby" Letter of Credit with an auto-extension provision (Plan B);³
- establish the entire Fund at the time construction commences;⁴
- adjust the Fund annually to account for inflation based on the then-current Consumer Price Index ("CPI"), as maintained by the Bureau of Labor Statistics;
- file an annual Fund status report with the revised estimated cost of decommissioning and the new Fund total by May 1 of each year;⁵ and
- increase the value of the Fund for inflation and not reduce the value of the Fund if the CPI has a negative value at the time the annual adjustment is calculated.⁶

1. Letter of March 24, 2011, from Karen Taylor, Esq., on behalf of EOS, to Susan Hudson, Clerk of the Board.

2. Letter of March 24, 2011, from Karen Taylor, Esq., on behalf of EOS, to Susan Hudson, Clerk of the Board at 2 and Attachment A.

3. EOS stated that it proposed two alternate plans because it may sell the Project and wants any prospective buyer to have more than one option. Letter of March 24, 2011, from Karen Taylor, Esq., on behalf of EOS, to Susan Hudson, Clerk of the Board at 2-3.

4. EOS initially proposed establishing the escrow account "when EOS commences commercial operation of the Project" and did not specify when it would obtain the letter of credit. The Department's March 31 letter noted that these proposals were not consistent with the Board's Order of 9/8/10 in this Docket. EOS's April 12 letter addressed the Department's concerns by certifying that the "entire" Fund would be established "at the time construction commences." Letters of March 24 and April 12, 2011, from Karen Taylor, Esq., on behalf of EOS, to Susan Hudson, Clerk of the Board; letter of March 31, 2011, from Geoffrey Commons, Esq., on behalf of the Department, to Susan Hudson, Clerk of the Board.

5. Based on the Department recommendation that the plan include a specific date for the annual filing, EOS agreed to file the report annually on May 1. Letters of March 24 and April 12, 2011, from Karen Taylor, Esq., on behalf of EOS, to Susan Hudson, Clerk of the Board; letter of March 31, 2011, from Geoffrey Commons, Esq., on behalf of the Department, to Susan Hudson, Clerk of the Board.

6. Letter of March 24, 2011, from Karen Taylor, Esq., on behalf of EOS, to Susan Hudson, Clerk of the Board at 2-3.

EOS's proposed Plan A would:

- establish an escrow account at an A-rated financial institution;
- name the Board as a beneficiary of the Fund;
- have the escrow account overseen by a third-party escrow agent that is independent of EOS;
- ensure that EOS has no control over the escrow funds or the actions of the escrow agent; and
- provide the Board with documentation demonstrating the establishment of the Fund and execution of the escrow agreement;⁷

EOS's proposed Plan B would:

- obtain an irrevocable standby Letter of Credit that includes an auto-extension provision ("evergreen clause");⁸
- have the Letter of Credit be issued solely for the benefit of the Board;⁹ and
- file copies of the Letter(s) of Credit with the Board, once it obtains them.¹⁰

First, we conclude that EOS's proposal to establish the entire Fund "*at the time* construction commences" is not sufficiently clear to satisfy the requirements of the Board's Order, which specifically requires EOS "to have a Fund in place *prior to* proceeding with construction."¹¹ Thus, we reiterate that EOS must establish a Fund prior to proceeding with construction and not concurrent with EOS's commencement of commercial operation¹² or construction.

7. Letter of March 24, 2011, from Karen Taylor, Esq., on behalf of EOS, to Susan Hudson, Clerk of the Board at 3.

8. The initial proposal stated that the Fund would "initially be funded" with a Letter of Credit. EOS clarified that the term "initially" referred to the fact that Plan B requires annual adjustments for inflation that may require EOS to amend its initial Letter of Credit or obtain additional Letters of Credit over time. EOS stated that it would not discontinue the Letter of Credit or replace the Letter of Credit with some other financial security. Letters of March 24 and April 12, 2011, from Karen Taylor, Esq., on behalf of EOS, to Susan Hudson, Clerk of the Board.

9. Letter of March 24, 2011, from Karen Taylor, Esq., on behalf of EOS, to Susan Hudson, Clerk of the Board.

10. Letter of April 12, 2011, from Karen Taylor, Esq., on behalf of EOS, to Susan Hudson, Clerk of the Board at 2; letter of March 31, 2011, from Geoffrey Commons, Esq., on behalf of the Department, to Susan Hudson, Clerk of the Board at fn. 1.

11. Docket 7618, Order of 9/8/10 at 25 (emphasis added).

12. See fn. 4.

Next, we conclude that, as proposed, EOS's plan to establish a Fund with an escrow account (Plan A) does not offer sufficient security to establish a Fund. EOS asserts that the escrow account proposed under Plan A satisfies the conditions of its CPG as "another appropriate financial security" that is bankruptcy remote.¹³ EOS states that:

EOS would retain a contingent interest in the escrow account. . . . If EOS declares bankruptcy before the Project is fully decommissioned, its bankruptcy estate would include EOS's contingent interest in the escrow account, but its creditors could ultimately obtain only any funds that remain in the account after decommissioning is complete. The Board would have the unfettered right to use all funds in the account to pay for decommissioning.

The Department believes that if the operative documents are appropriately drafted, the escrow account would be bankruptcy remote and recommends that, prior to the commencement of construction, EOS should submit its operative documents or detailed information regarding the escrow account (including identifying information and the instructions to the third-party escrow agent) to the Board and Department for review and for Board approval.¹⁴ EOS's proposal states that it will "provide the Board with documentation demonstrating the establishment of the Fund and execution of the escrow agreement," but EOS did not agree to the requirement proposed by the Department in its April 19 letter. It is unclear whether an escrow account could provide sufficient security to establish a Fund. Therefore, we can not approve Plan A at this time. If EOS wishes to obtain Board approval for a Fund established with a stand-alone escrow account, EOS must refile a decommissioning plan that includes operative documents for any proposed escrow account, detailed information regarding such an escrow account (including identifying information and the instructions to the third-party escrow agent), and a legal opinion from a bankruptcy attorney regarding the bankruptcy-remoteness of the proposed escrow account.

Finally, we conclude that an appropriately drafted stand-alone Letter of Credit (Plan B) offers sufficient security to establish a Fund. However, although EOS proposes to "file copies of

13. In support of its conclusion, EOS cites to a previously approved decommissioning plan that established a Fund with an escrow account. Docket 7594, Order of 8/3/10. In hindsight, the Board's decision to approve such a plan may not have offered sufficient security to ensure decommissioning. Although we strive for consistency, we must adjust our decisions as we identify concerns.

14. Letter of April 19, 2011, from Geoffrey Commons, Esq., on behalf of the Department, to Susan Hudson, Clerk of the Board.

the Letter(s) of Credit with the Board, once it obtains them"¹⁵ the Department recommends that, prior to the commencement of construction, EOS should submit its operative documents to the Board and Department for review and for Board approval.¹⁶ Therefore, to ensure that the Letter of Credit is appropriately drafted, we require that, prior to the commencement of construction, EOS must submit its initial Letter of Credit to the Board and Department for review and for Board approval.

We therefore deny, without prejudice, EOS's plan to establish a Fund with an escrow account (Plan A), and approve EOS's decommissioning plan to establish a Fund with a Letter of Credit (Plan B), as detailed above.

SO ORDERED.

15. Letter of April 12, 2011, from Karen Taylor, Esq., on behalf of EOS, to Susan Hudson, Clerk of the Board at 2; letter of March 31, 2011, from Geoffrey Commons, Esq., on behalf of the Department, to Susan Hudson, Clerk of the Board at fn. 1.

16. Letter of April 19, 2011, from Geoffrey Commons, Esq., on behalf of the Department, to Susan Hudson, Clerk of the Board.

DATED at Montpelier, Vermont, this 5th day of May, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

Filed: May 5, 2011

Attest: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)